A **THIVASALIM ABDUL MAJEED**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN JCA
[CRIMINAL APPEAL NO: B-05-213-07-2011]
C 4 OCTOBER 2013

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Conviction and sentence - Appeal against - Drugs found in car driven by appellant but rented by another individual*
D *- Whether duty of prosecution to exclude possibility of other individuals as not having access to car or drugs - DNA found on items recovered from car - Whether originated from different sources - Whether exculpated appellant and incriminated other individuals - Admission of statement recorded under s. 112 Criminal Procedure Code - Whether conditions*
E *satisfied - Evidence Act 1950, s. 32 - Whether there were gaps in prosecution's case - Whether possession of drugs proved*

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Trafficking in dangerous drugs - Allegation of - Drugs found*
F *in car driven by appellant but rented by another individual - Whether duty of prosecution to exclude possibility of other individuals as not having access to car or drugs - DNA found on items recovered from car - Whether originated from different sources - Whether exculpated appellant and incriminated other individuals - Admission of statement recorded*
G *under s. 112 Criminal Procedure Code - Whether conditions satisfied - Evidence Act 1950, s. 32 - Whether there were gaps in prosecution's case - Whether possession of drugs proved - Whether appeal allowed*

The appellant was charged under s. 39B(1)(a) of the Dangerous
H Drugs Act 1952, punishable under s. 39B(2) of the same Act. Acting on information received in relation to drug trafficking activities, SP5 and his men tailed a car until it stopped in front of a house. The driver ('the appellant') was the only occupant in the said car. As soon as the appellant opened the door of the car,
I SP5 rushed towards the car and arrested the appellant where a struggle ensued. SP5 recovered three travelling bags from the boot

of the car containing plastic packages. The substances in the plastic packages were later confirmed to be a mixture of heroin and monoacetylmorphine with a quantity of 4,122.2g. SP9 had examined the car and recovered bottles of mineral water from the front passenger seat and some clothes from the back seat. The chemist, SP10, conducted the DNA analysis on the recovered items and found that (a) one of the bottles of mineral water carried the DNA of the appellant; (b) a partial male DNA profile was derived from the t-shirt (exh. P66) which did not match the DNA of the appellant; and (c) the DNA derived from the blue sweater (exh. P64) consisted of a mixture of DNA types from at least two individuals. The appellant's defence was that he had no knowledge of the presence of the three bags in the car containing the drugs. Evidence showed that the car was rented by one Azli which was affirmed by SP12 from AMM Services who testified that Azli was his regular customer and had signed the agreement to rent the car and had paid for the rental. According to the appellant, Azli was responsible for the car and that he was driving the car to Azli's house upon the latter's instruction. The Judicial Commissioner ('JC') found the defence to be a mere denial and that the appellant was not a credible witness. The appellant was thus found guilty for trafficking in dangerous drugs and was convicted and sentenced to death. Hence, this appeal. The issues that arose for consideration were, *inter alia* (i) whether the JC had conducted a maximum evaluation of the evidence provided; (ii) whether there were gaps in the prosecution's case; (iii) whether the JC erred in admitting Azli's statement recorded under s. 112 of the Criminal Procedure Code; and (iv) whether the JC erred when she convicted the appellant of a trafficking charge and sentenced him to death.

Held (allowing appeal; acquitting and discharging accused)
Per Tengku Maimun JCA delivering the judgment of the court:

(1) It is the duty of the prosecution to exclude the possibility of other individuals as not having access to the car and/or have anything to do with the drugs. It was also important for the JC to ask herself whether anybody else had used the car before the appellant's arrest. However, what had escaped the evaluation of the JC was the recovery of the sweater (P64) and a t-shirt (P66) on which there existed the

A DNA of an unknown male. The presence of the DNA on the sweater and the t-shirt recovered from the boot of the car established that at least two other individuals were connected to the car. (paras 20-22)

B **(1a)** The evidence of the chemist and her report clearly showed that the DNA profile on the sweater and t-shirt originated from different sources where the appellant was excluded as being the contributor of the DNA profile. Thus, quite apart from the fact that the appellant was alone in the car at the C material time, there was other evidence before the court *ie*, the DNA evidence which exculpated the appellant and incriminated other individuals. In failing to consider this, the JC had not undertaken the maximum evaluation of the evidence. (para 23)

D **(2)** The production of Azli was indeed an issue in this case. Although Azli was not with the appellant when the latter was arrested, the fact that Azli had, among others, control and custody of the car had not been excluded. Azli could have given an explanation as to the existence of the DNA E profile on the sweater and the t-shirt and could have closed the gap in the prosecution's case. (para 31)

(3) The prosecution had sought to admit the s. 112 statement made by Azli ('P101') under s. 32 of the Evidence Act 1950. F In this regard, there was no evidence led as to whether efforts were made to locate Azli. Without any efforts made to call Azli on his handphone number and to locate Azli at the address stated in his s. 112 statement or at other available addresses, it could not be said that Azli could not G be found. The conditions for P101 to be admitted under s. 32 of the Evidence Act 1950 had not been met. Therefore, the JC had erred in admitting P101. (para 33)

(4) The JC had erred in failing to consider the possibility of H other individuals having access to the car. Further, there were gaps in the prosecution's case and the possession of the drugs had not been proved. Thus, the appellant's conviction and sentence by the High Court was set aside. (para 34)

I

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, yang boleh dihukum di bawah s. 39B(2) Akta yang sama. Bertindak atas maklumat yang telah diterima berkenaan aktiviti pengedaran dadah, SP5 dan pasukannya telah mengekori sebuah kereta sehingga ia berhenti di depan sebuah rumah. Pemandu kereta tersebut ('perayu') adalah satu-satunya penghuni di dalam kereta itu. Sebaik sahaja perayu membuka pintu kereta, SP5 telah menghala ke arah perayu dan menangkap perayu di mana satu pergelutan telah berlaku. SP5 mendapati tiga beg daripada bahagian belakang kereta yang mengandungi bungkusan plastik. Bahan-bahan yang dijumpai dalam bungkusan plastik disahkan sebagai satu campuran heroin dan monoacetylmorphine dengan kuantiti 4,122.2 gram. SP9 telah memeriksa kereta tersebut dan mendapati beberapa botol air daripada tempat duduk penumpang depan dan beberapa pakaian daripada tempat duduk penumpang di belakang. Ahli kimia, SP10, telah menjalankan analisa DNA ke atas item-item yang ditemui, dan mendapati bahawa (a) salah satu daripada botol air itu mempunyai DNA perayu; (b) sebahagian profil DNA seorang lelaki yang tidak dikenali telah diperolehi daripada kemeja-t (eks. P66) yang tidak padan dengan DNA perayu; dan (c) DNA yang diperolehi daripada baju sejuk berwarna biru (eks. P64) mengandungi satu campuran jenis DNA daripada sekurang-kurangnya dua individu. Pembelaan perayu adalah bahawa dia tidak mempunyai pengetahuan berkenaan kehadiran ketiga-tiga beg yang mengandungi dadah tersebut. Keterangan menunjukkan bahawa kereta tersebut telah disewa oleh satu Azli yang telah disahkan oleh SP12 daripada AMM Services yang memberi keterangan bahawa Azli adalah pelanggan tetapnya dan telah menandatangani perjanjian untuk menyewa kereta dan membayar sewanya. Menurut perayu, Azli bertanggungjawab untuk kereta itu dan perayu telah membawa kereta itu atas arahan Azli. Pesuruhjaya Kehakiman ('PK') mendapati pembelaan adalah penafian semata-mata dan perayu bukanlah saksi yang boleh dipercayai. Perayu, oleh itu, didapati bersalah atas kesalahan pengedaran dadah dan disabitkan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini. Isu-isu yang timbul untuk pertimbangan, antara lain, adalah (i) sama ada PK telah memberi penilaian maksima ke atas keterangan yang telah dikemukakan; (ii) sama ada terdapat kelompangan pada kes pendakwaan; (iii) sama ada PK khilaf apabila menerima masuk kenyataan yang dibuat oleh Azli

di bawah s. 112 Kanun Tatacara Jenayah; dan (iv) sama ada PK khilaf apabila dia mensabitkan perayu dengan pertuduhan pengedaran dan menjatuhkan hukuman mati ke atasnya.

Diputuskan (membenarkan rayuan; melepaskan dan membebaskan perayu)
Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Adalah tanggungjawab pihak pendakwaan untuk mengecualikan kemungkinan terdapatnya individu-individu lain yang tidak mempunyai akses kepada kereta dan/atau kaitan dengan dadah-dadah itu. Ia juga penting untuk PK mempersoalkan sama ada terdapat individu lain yang telah mengguna kereta itu sebelum perayu ditahan. Walau bagaimanapun, apa yang telah gagal dinilai oleh PK adalah penemuan baju sejuk (P64) dan kemeja-t (P66) yang mempunyai DNA seorang lelaki yang tidak dikenali. Kehadiran DNA di baju sejuk dan kemeja-t yang dijumpai di dalam bahagian belakang kereta itu membuktikan bahawa terdapat sekurang-kurangnya dua lagi individu yang mempunyai hubungan dengan kereta itu.

(1a) Keterangan ahli kimia dan laporannya jelas menunjukkan bahawa profil DNA yang terdapat di baju sejuk dan kemeja-t berasal dari sumber lain di mana perayu dikecualikan sebagai penyumbang kepada profil DNA itu. Oleh itu, selain daripada fakta bahawa perayu bersendirian di dalam kereta pada waktu material itu, terdapat keterangan lain di hadapan mahkamah, iaitu, keterangan DNA yang telah mengecualikan perayu dari kesalahan itu dan telah membabitkan individu lain. Oleh kerana PK telah gagal mempertimbangkan perkara ini, maka PK tidak memberi penilaian maksima ke atas keterangan yang dikemukakan.

(2) Kehadiran Azli adalah satu isu dalam kes ini. Walaupun Azli tidak berada bersama perayu apabila perayu ditangkap, fakta bahawa Azli, antara lain, mempunyai kawalan dan milikan ke atas kereta itu tidak dikecualikan. Azli sepatutnya memberi penjelasan kepada kewujudan profil DNA ke atas baju sejuk dan kemeja-t dan boleh menutupi kelompangan yang terdapat di dalam kes pendakwaan.

(3) Pihak pendakwaan telah memohon supaya kenyataan s. 112 yang dibuat oleh Azli ('P101') di bawah s. 32 Akta Keterangan 1950 diterima masuk. Dalam hal ini, tiada

keterangan yang menunjukkan sama ada usaha telah dibuat untuk mencari Azli. Tanpa usaha untuk memanggil Azli melalui telefon bimbitnya dan untuk mencari Azli di alamat yang telah dinyatakan di dalam kenyataan s. 112 atau di alamat-alamat yang lain, ia tidak boleh dikatakan bahawa Azli tidak dapat dikesan. Syarat untuk menerima masuk P101 di bawah s. 32 Akta Keterangan 1950 tidak dipatuhi. Oleh itu, PK telah khilaf apabila menerima masuk P101.

(4) PK telah khilaf apabila gagal mempertimbangkan kemungkinan terdapat individu-individu lain yang mempunyai akses kepada kereta itu. Tambahan, terdapat kelompangan dalam kes pendakwaan dan milikan ke atas dadah itu tidak dapat dibuktikan. Oleh itu, sabitan dan hukuman perayu yang dijatuhkan oleh Mahkamah Tinggi harus diketepikan.

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Jitweer Singh Ojagar Singh [2014] 1 CLJ 433 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, s. 39B(1)(a), (2)
Evidence Act 1950, s. 32

For the appellants - Hisyam Teh Poh Teik Abdullah; T/n Teh Poh Teik & Co
For the respondent - Tetralina Ahmad Fauzi; DPP

[Editor's note: For the High Court judgment, please see Thivasalim Abdul Majeed lwn. PP [2011] 1 LNS 1753.]

Reported by Suhainah Wahiduddin

JUDGMENT

Tengku Maimun JCA:

[1] The appellant was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act.

[2] The case for the prosecution is as follows. Acting on information received on drug trafficking activity, on 27 July 2007 at about 7.30am C/Insp Balasubramaniam Rajoo (SP5) and his men went to the targeted spot at Petronas petrol station at Batu 7 1/2 Jalan Cheras-Kajang, Selangor. After keeping observation for about one and half hours, SP5 saw a car bearing registration number WJC 8809 passed by. The driver was the only occupant in the said car.

[3] SP5 and his men tailed the car until it stopped in front of a house at Jalan Penggawa 1/2, Bandar Mahkota, Cheras. As soon as the driver (later identified as the appellant) opened the door, SP5 rushed towards the car and arrested the appellant. The appellant put up a struggle. Nothing incriminating was found on the body of the appellant but from the boot of the car, SP5 recovered three travelling bags. The first bag (exh. P9), the second bag (exh. P14) and the third bag (exh. P19) contained 53, 30 and 54 plastic packages respectively. The bags and the plastic packages were seized by SP5. The substances in the plastic packages were later confirmed to be a mixture of heroin and monoacethylmorphine with a quantity of 4,122.2g.

[4] The car was rented by one Azli Mior Basri. SP12 from AMM Services testified that Azli who was his regular customer had signed the agreement to rent the car on 20 July 2007 and that Azli had paid the rental. The rental was initially for three days but Azli had called SP12 to extend the hiring of the car. On 22 July 2007 the car had broken down and Azli had telephoned SP12 to inform about the car and requested that it be repaired. After the car was taken to the workshop for repair, the appellant had persistently called asking for the car.

[5] Chief Inspector Zainol Hisham Abu (SP9) the officer who examined the car recovered bottles of mineral water from the front passenger seat and from the back seat, SP9 recovered a jacket and a pair of slippers of size 10. From the boot of the car, SP9 recovered:

(i) a pair of shoes size 8;

(ii) a blue coloured sweater;

(iii) a blue coloured t-shirt;

(iv) a blue shirt of size L;

(v) a dark blue blanket.

[6] The items recovered were handed to the investigating officer (SP14) who then sent them to the chemist department. The chemist (SP10) who conducted the DNA analysis came to the following findings:

(i) one of the bottles of mineral water carries the DNA of the appellant;

(ii) a partial male DNA profile was derived from the t-shirt (exh. P66) which did not match the DNA of the appellant;

(iii) the DNA profile derived from the blue sweater (exh. P64) consisted of a mixture DNA types from at least two individuals. One is consistent with the partial male DNA profile derived from the t-shirt. The appellant was excluded as being the other contributor of this mixed DNA profile.

[7] At the close of the prosecution's case, the learned Judicial Commissioner found that the appellant had possession of the car and of the drugs. On possession of the car, the learned Judicial Commissioner found:

> 28. ... Walaupun kereta disewa oleh Azli fakta menunjukkan pada masa yang relevan WJC 8809 berada di bawah jagaan dan kawalan Tertuduh semata-mata. Siasatan yang dijalankan oleh SP14 juga menunjukkan tidak ada orang lain terlibat dengan pengedaran dadah ini kecuali Tertuduh. Tertuduh telah menunjukkan perilaku seorang yang berkepentingan terhadap WJC 8809. Mahkamah berpandangan walaupun WJC 8809 disewa oleh Azli, penyewa sebenar ialah Tertuduh. Secara fizikal WJC 8809 berada dengan Tertuduh dan bukan Azli pada hari, waktu dan di tempat pengedaran sebagaimana tercatit pada pertuduhan.

[8] On possession of the drugs, the learned Judicial Commissioner made the following findings:

> 29. P9, P14 and P19 merupakan beg pakaian yang besar yang boleh dilihat dengan mudah oleh sesiapa sahaja. P9, P14 dan P19 ditemui oleh SP5 dalam keadaan hanya ditutup dengan zipnya ditarik sahaja dan tidak dikunci. Melihat cara barang kes disimpan, saiznya dan juga jumlah beg yang berada dalam WJC 8809 yang berada di bawah kawalan sepenuhnya Tertuduh pada hari, waktu dan di tempat yang diperihalkan dalam pertuduhan inferens yang kuat boleh dibuat, Tertuduh mempunyai pengetahuan mengenai apa sebenarnya yang berada dalam P9, P14 dan P19 yang berada dalam WJC 8809 yang dipandunya.

A

30. Sama ada kenderaan itu didaftar atas nama Tertuduh atau tidak menjadi isu dalam kes ini kerana isu ini tidak relevan. Perkara yang hendak dilihat oleh Mahkamah ialah sama ada Tertuduh mempunyai kawalan dan jagaan terhadap P9, 14 dan 19 berserta kandungannya yang berada dalam but kenderaan tersebut. Seperkara lagi pada masa tangkapan Tertuduh berada berseorangan dalam kenderaan dan tidak terdapat orang lain dalam kenderaan tersebut selain daripada Tertuduh.

B

[9] The learned Judicial Commissioner made the following finding on the appellant's DNA:

C

31. Seperkara lagi dua botol air minuman yang ditemui pada tempat duduk penumpang di bahagian hadapan bersebelahan dengan pemandu (Tertuduh) telah disahkan oleh SP10 iaitu Ahli Kimia (DNA) mengandungi DNA Tertuduh dan tiada DNA pihak lain ditemui dalam kenderaan tersebut.

D

[10] The conduct of the appellant was also considered by the learned Judicial Commissioner as follows:

E

32. SP5 juga telah menyatakan Tertuduh kelihatan takut dan cemas semasa SP5 menjalankan pemeriksaan terhadap kenderaan tersebut. Menurut SP6 pula berlaku pergelutan semasa SP5 hendak menggari tertuduh. Tertuduh dikatakan dalam ketakutan, meronta-ronta dan cuba mengelak daripada digari dan gagal memberi kerjasama kepada SP5. Walaupun telah disoal balas secara bertubi-tubi SP6 tetap konsisten dalam memberi keterangan berhubung perilaku Tertuduh pada masa tangkapan yang membawa inferens perilaku yang konsisten dengan pengetahuan bahawa P9, P14 dan P19 mengandungi dadah iaitu bahan yang menyalahi undang-undang.

F

G

[11] On the basis of proximity of the drugs and the appellant, the learned Judicial Commissioner found that:

H

40. Berdasarkan perilaku Tertuduh, dadah yang berada berhampiran dengan Tertuduh, fakta tiada orang lain dalam kenderaan kecuali Tertuduh dan kegagalan Tertuduh memberi penjelasan tentang kewujudan P9, P14 dan P19 berserta kandungannya dan perkara-perkara di sekeliling tangkapan Tertuduh secara bersekali Mahkamah membuat inferens Tertuduh sedang mengangkut dadah berbahaya tersebut dalam WJC 8809 dan Tertuduh sedar dan tahu apa yang berada dalam P9, P14 dan P19 sebenarnya ialah dadah berbahaya sebagaimana yang ditakrif dalam Seksyen 2 Akta dan juga Jadual Pertama Akta ...

I

[12] The defence of the appellant was that he had no knowledge of the presence of the three bags in the car which contained the drugs. The appellant explained the circumstances under which he drove the car. We do not wish to set out his explanation in full, suffice to state that Azli (whom the appellant referred to as 'Ali') was said to be responsible for the car and that he was driving the car to Ali's house on the instruction of Ali. The learned Judicial Commissioner found the defence to be a mere denial and that the appellant was not a credible witness.

[13] The appellant was thus found guilty for trafficking in dangerous drugs. He was convicted and sentenced to death. Before us is the appeal against the said conviction and sentence. The petition of appeal sets out the following reasons for the appeal:

1. The Learned Judicial Commissioner erred in facts and in law when Her Ladyship convicted the Appellant of a trafficking charge and sentenced him to death.

2. The Learned Judicial Commissioner misdirected herself when Her Ladyship, to the prejudice of the Appellant made, two different findings at the close of the Prosecution's case. This could be seen from her written judgment and her decision at the close of the Prosecution's case.

3. The Learned Judicial Commissioner erred in facts and in law when Her Ladyship failed to realize that:

   (a) adverse inference under Section 114(g) of the Evidence Act could be invoked against the Prosecution for failing to call Azli Mior Basri;

   (b) without Azli Mior Basri the Prosecution could not be said to have proven possession;

   (c) without Azli Mior Basri being made available to the Appellant defence had been hampered.

4. The Learned Judicial Commissioner erred in facts and in law when Her Ladyship failed to consider the Appellant's defence. Her Ladyship erred when she held that the evidence of the Appellant's sister (SD2) had to be accepted with care as she was present in open court during the trial and that she was an interested witness.

A 5. The Learned Judicial Commissioner erred in facts and in law when Her Ladyship failed to realize that, under the circumstances of the case, this is a case of possession and not trafficking.

B **[14]** The appellant had an additional ground of appeal which reads "That the learned trial judge misdirected herself when she held that the appellant had failed to rebut the trafficking presumption under s. 37(da) when the said presumption was never invoked." Learned counsel for the appellant did not pursue ground 3(a) of the petition of appeal.

C

Whether Possession Of The Drugs Had Been Proved

[15] Although there are six grounds in the petition of appeal, having read the written submissions and having heard the oral D submissions, we find that central to the appeal was the issue of Azli, the person who had rented WJC 8809. Azli did not give evidence in court but his statement was recorded under s. 112 of the Criminal Procedure Code.

E **[16]** Learned counsel for the appellant conceded that the appellant was persistent in calling for the car when it broke down and when it was under repair and that the appellant was alone in the car when he was arrested. However it was the submission of learned counsel that it cannot be disputed that there is a close nexus between Azli and the car and that Azli was an important F witness. Relying on among others, the case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113, learned counsel submitted that it is the duty of the prosecution to exclude the possibility that others could not have had access to the car. On the ground of the failure to call Azli and the insufficient evaluation by the learned G Judicial Commissioner of the role played by Azli, it was argued by learned counsel that there certainly is a gap in the case for the prosecution and that the element of possession was not proven.

[17] In *Ibrahim Mohamad & Anor* (*supra*), acting on a tip-off, the H police apprehended the accused persons who at the material time were in a vehicle. From the back seat rest of the vehicle, 40 transparent plastic packages of cannabis were recovered. The accused persons were tried, convicted and sentenced to death for trafficking in 38,499.68g cannabis. The only evidence which the I learned trial judge had relied upon in order to conclude that both the accused were in custody and control of the drugs was:

(i) That the first accused was the driver of the vehicle and the second accused was the passenger on the date of the arrest. A

(ii) That the second accused was previously summoned for driving the vehicle without licence in Kulim, Kedah about six months prior to the date of his arrest in the present case. B

[18] The accused appealed to the Court of Appeal. The appeal was dismissed. On appeal to the Federal Court, the Federal Court allowed the appeal. The conviction on the charge of trafficking was substituted with one of possession. The gist of the decision of the Federal Court is that: C

(i) the prosecution had failed to exclude the possibility that other individuals could not have had custody or control of the vehicle immediately prior to the date of the arrest; D

(ii) even if the learned trial judge was correct in deciding that both the accused were in custody and control of the vehicle when they were stopped by the police party, this could not be translated into having custody or control over the said drugs in the absence of other incriminating evidence against them; E

(iii) whilst the conduct of the accused in fleeing the scene may be a relevant factor to be considered, such a conduct must be weighed against the circumstances of the case. F

[19] The learned DPP attempted to distinguish the facts of the instant case with *Ibrahim Mohamad & Anor* (*supra*). It was her submission that in the instant case when the police tailed the car, only the appellant was in the car. It was thus the submission of the prosecution that there was no error by the learned Judicial Commissioner in coming to her decision that the appellant was in control and custody of the car and had possession of the drugs based on the following facts: G

(i) It was the appellant who took delivery of the car rented by Azli; H

(ii) It was the appellant who had angrily pressured SP11 and SP12 for the car when it was under repair;

(iii) It was the appellant who took delivery of the car upon being repaired; I

(iv) When the appellant was arrested, there was no one else in the said car.

[20] We are mindful of the fact that in this case the police had been tailing the car with only the appellant inside it and that no one else was seen in the car. We are also mindful of the fact that the appellant had resisted the arrest and that the appellant's conduct is a relevant consideration to infer knowledge of the drugs (see *Parlan Dadeh v. PP* [2009] 1 CLJ 717).

[21] However, what had escaped the evaluation of the learned Judicial Commissioner is the recovery of a sweater and a t-shirt on which there exist the DNA of an unknown male. SP10 had given evidence that the DNA profile derived from the sweater and the t-shirt did not match the DNA of the appellant.

[22] It cannot be denied that the sweater (P64) and the t-shirt (P66) were proximate to the drugs. The presence of the DNA on the sweater and the t-shirt recovered from the boot of the car established that at least two other individuals were connected to the car. It is the duty of the prosecution to exclude the possibility of other individuals as not having access to the car and/or have anything to do with the drugs and it is important for the learned Judicial Commissioner to ask herself whether anybody else had used the car before the arrest of the appellant. The learned Judicial Commissioner had not directed her mind to this aspect where it is imperative for the prosecution to exclude the possibility that other individuals could not have had custody or control of the car in order to prove possession (see *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265; [1992] 1 MLJ 137; *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1).

[23] The learned Judicial Commissioner at para. 31 of the grounds of judgment states that "tiada DNA pihak lain ditemui dalam kenderaan tersebut". With respect, we find the above finding by the learned Judicial Commissioner erroneous. The evidence of the chemist and her report clearly shows that the DNA profile on the sweater and t-shirt originated from different sources where the appellant was excluded as being the contributor of the DNA profile. Thus, quite apart from the fact that the appellant was alone in the car at the material time, there was other evidence before the court ie, the DNA evidence which

exculpates the appellant and incriminates other individuals. In failing to consider this, the learned Judicial Commissioner had not undertaken the maximum evaluation of the evidence.

Admissibility Of The Section 112 Statement

[24] The prosecution had sought to admit s. 112 statement made by Azli (exh. P101) under s. 32 of the Evidence Act 1950. In essence, s. 32 provides for the admission of statements made by a person who cannot be found or whose attendance cannot be procured without unreasonable delay or expense. The move by the prosecution to admit exh. P101 was objected by learned counsel for the defence on the ground that the conditions for the application of s. 32 had not been complied with.

[25] The learned Judicial Commissioner ruled "Tak apa saya kekalkan dulu nanti saya buat keputusan kemudian...". Despite having reserved the ruling on the objection by learned counsel for the appellant on the admissibility of s. 112 statement, the learned Judicial Commissioner unfortunately failed to make any such ruling either in the course of the trial or in the grounds of judgment.

[26] It was submitted by the learned DPP that although exh. P101 was admitted, there was no error on the part of the learned Judicial Commissioner as Her Ladyship did not rely on s. 112 statement in finding that the prosecution had proven their case. Further, the learned DPP highlighted that this issue was not stated in the petition of appeal. In response, Encik Hisyam Teh Poh Teik submitted that para. 3 of the petition of appeal is wide enough to cover the issue of admissibility of s. 112 statement.

[27] We agree with Encik Hisyam that para. 3 of the petition of appeal covers the point taken by the appellant on the admissibility of s. 112 statement. The issue of admissibility of exh. P101 is directly connected to Azli. The ground put forth by the appellant in para. 3 of the petition of appeal is that without Azli, the prosecution could not be said to have proven possession and that without Azli being made available, the appellant's defence had been hampered. In any event, it is no longer an inflexible rule that it is mandatory that grounds not itemised in the petition of appeal must be disregarded without any discretion to admit it (see Mahkamah Persekutuan antara *PP v. Jitweer Singh Ojagar Singh* [2014] 1 CLJ 433).

[28] The evidence of SP15 shows that several attempts were made to locate Azli. For ease of reference, the evidence is reproduced below:

> Pada 10 Disember 2010 saya bersama DSM Abd Rahman telah pergi ke alamat No. 24 Jalan Penggawa 7/2, Bandar Mahkota Cheras dan dapati di alamat tersebut dihuni oleh seorang perempuan India.
>
> ...
>
> Pada 13 Disember 2010 saya telah buat permohonan ke Jabatan Pendaftaran Negara bagi mendapatkan family tree ke atas penama Azli bin Mior Basri dan saya terima senarai nama ahli keluarga penama. ... Pada 15 Disember saya ada hantar satu semboyan kepada KBSJND Kuantan, Pahang bagi mengesan penama Haryati binti Jamil iaitu isteri kepada penama di alamat B28, Kampung Paya Bunga, Kuantan, Pahang.

[29] SP15 further testified:

> Pada 16 Disember 2010 saya bersama L/Koperal Zamzul pergi ke alamat iaitu adik lelaki penama di alamat C-2-14, PPR Taman Wahyu 2, Jalan Sibu Off Jalan Ipoh, Kuala Lumpur. Tiba di alamat tersebut saya dapati tiada penama Azrul yang tinggal di sana. Azrul merupakan adik kepada Azli dan saya telah temuramah penghuni rumah iaitu Andre Azhar bin Abdul Azli.
>
> ...
>
> ...
>
> Pada 17 Disember 2010 bersama L/Koperal Zamzul telah pergi ke alamat Lot 9, Jalan Dewan, KM 10.8 Kampung Simpang 3, Gombak ... ini alamat adik perempuan Azli bin Mior Basri ... Setibanya di alamat tersebut ... Mazlin beritahu tidak tahu tempat tinggal abangnya serta tidak mempunyai nombor telefon abangnya...
>
> ...
>
> Pada 27 Disember 2010 saya ada menghubungi Wartawan bagi akhbar Berita Harian, akhbar Sinar, akhbar Kosmo dan Utusan Malaysia untuk minta bantuan buat hebahan media bagi mengesan penama Azli bin Mior Basri.
>
> ...

Pada 30 Disember 2010 di muka surat 14, akhbar Kosmo terdapat hebahan mengenai penama ini. ... Saya ada membuat permohonan kepada Jabatan Pengangkutan Jalan bagi mendapatkan alamat terkini penama dan saya ada serahkan satu salinan alamat penama.

[30] SP15's testimony on the efforts made to locate Azli goes to show that Azli is an important witness. The finding of the learned Judicial Commissioner on Azli is as follows:

43. Atas penghujahan peguam bela berhubung isu kegagalan pihak pendakwaan mengemukakan Azli sebagai saksi dan supaya Mahkamah membuat anggapan bertentangan menurut seksyen 114(g) Akta Keterangan 1950, Mahkamah berpuashati percubaan yang munasabah telah dibuat oleh pihak pendakwaan bagi mengesan Azli namun Azli tidak berjaya dikesan oleh SP15. Dalam apa-apa keadaan Tertuduh ditangkap bersendirian dalam WJC 8809 dengan dadah yang menyalahi undang-undang. Azli tidak berada bersama-sama Tertuduh semasa Tertuduh ditangkap. Oleh yang demikian kegagalan memanggil Azli tidak menjadi isu dalam kes ini.

[31] Although Azli was not with the appellant when the appellant was arrested, given the fact that it was Azli who rented the car; given that the possibility of Azli having the control and custody of the car had not been excluded and given that there are other individuals who contributed to the DNA profile on the sweater and the t-shirt which were so proximate to the drugs, it is our judgment that the production of Azli is indeed an issue in this case. Azli could have given an explanation as to the existence of the DNA profile on the sweater and the t-shirt and could have closed the gap in the prosecution's case.

[32] It must have been upon realising the importance of the evidence of Azli that the prosecution took recourse to s. 32 of the Evidence Act. In this regard, there was no evidence led as to whether efforts were made to locate Azli at the address stated in his s. 112 statement ie, No. 7-16-08, Flat Sri Selangor, Jalan San Peng, Kuala Lumpur. We noted that the handphone number of Azli was also stated in his statement. There was no evidence as to whether SP15 did make any attempts to contact Azli through the said handphone number. The family tree of Azli disclosed the address of his mother at No. 2, Kedai Kopi Kampung Manggis,

A Slim River, Perak. Again there was no evidence that SP15 had gone to this address to locate Azli. Insofar as the address at Revena Villa, Jalan Danau Putra 7, Danau Putra is concerned, there was only a single visit made to the said address. There was no follow up visit thereafter to ascertain if indeed the premise was
B not occupied as testified by SP15.

[33] Without any efforts made to call Azli on his handphone number and to locate Azli at other available addresses mentioned above, it could not be said that Azli cannot be found. There is
C therefore much force in the submission of learned counsel for the appellant that the conditions for exh. P101 to be admitted under s. 32 of the Evidence Act had not been met. It is thus our view that the learned Judicial Commissioner had erred in admitting exh. P101.

D

[34] On the evidence available, it is our judgment that the learned Judicial Commissioner erred in failing to consider the possibility of other individuals having access to the car. Had the learned Judicial Commissioner asked herself the right question, Her Ladyship would have found that there is a gap in the prosecution's case
E and that possession of the drugs had not been proved. We therefore unanimously allowed the appeal. The conviction and sentence by the High Court was set aside. The appellant was acquitted and discharged.

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